It does not *necessarily* follow that because no action will lie for such excavation until some subsidence of the plaintiff's land, that, therefore, a new action may be maintained for every succeeding subsidence; and the point involved in the principal case is so novel and so delicate, there has been so much conflict of opinion on it in England, and so little consideration of it in this country, that it must be considered an open one with us, and deserving the most careful examination whenever it shall properly arise.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Kentucky.

SULLIVAN, &c., *v.* KUYKENDALL.

Where A., desiring to talk over the telephone with B., asked the operator to call him, and the operator thereupon had a conversation with B., reporting to A., who was standing by, what B. said as it came over the wire, *held*, in a subsequent action between A. and B. the former might prove by himself and others what the operator reported to him as coming from B., the operator being called and not remembering the conversation.

The fact of mailing a letter, properly addressed, with postage prepaid, creates no legal presumption that it was duly received; but it is merely a fact which is to be weighed along with other evidence in determining the question, and to which no more presumption attaches than to any other fact.

APPEAL from Warren Circuit Court.

Hansell & Mitchell, E. W. Hines, for appellants.

N. A. Porter, for appellee.

The opinion of the court was delivered by

HOLT, J.—By the terms of a verbal contract for the sale of personal property the appellants, Sullivan & Co., were to estimate and receive it within ten days after notice from the appellee, Kuykendall, that it was ready.

On January 26th 1880, he wrote them a letter, which by due course of mail should have been received by them within the next two days, but which in point of fact, as the testimony shows, was not received until February 17th 1880, notifying them that the property would be ready for them on February 9th 1880.

About February 11th or 12th 1880, Green river began rising and by the 13th of the same month had overflowed its banks; and the property being along them, was in the main destroyed.

The letter above named was properly enveloped, stamped and

deposited in the post-office, and addressed to the appellants at their usual post-office.

The lower court in substance instructed the jury that if they believed from the evidence that said letter was written, addressed to the appellants at their proper post-office, duly stamped, and placed in the office, then the presumption was that it was received in due course of mail; and that this presumption must prevail, unless overthrown by satisfactory evidence, that it was not so received.

This instruction was doubtless based upon the statement to be found in some text-books, and a few cases to the effect that when a letter is sent by the post it is to be presumed from the known course in that department of the public service that it reached its destination at the usual time, and was received by the person to whom it was addressed, if living there, and usually receiving his letters at that place.

It will be found, however, that the most of these cases go no farther than to hold that, in the absence of all other evidence upon the point, the mailing of a letter, properly directed, raises a presumption that it was received; and that this presumption must prevail unless rebutted by other testimony.

In the leading case of *Huntley* v. *Whittier*, 105 Mass. 391, the learned judge (GRAY, J.,) said that the depositing of a letter in the post-office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of mail; but that the jury should be so instructed only in the *absence* of other testimony upon the point.

The case of *Russell* v. *Buckley*, 4 R. I. 525, is to the same effect; while authority is abundant that the mailing of a letter creates no presumption whatever that it was duly received.

In *United States* v. *Babcock*, 3 Dillon's C. C. Rep. 571, Judge DILLON uses this language: "Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice BIGELOW in *Commonwealth* v. *Jeffries*, 7 Allen 563, that this is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed."

"This is not a conclusive presumption; and *it does not even*

create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters."

In the case of negotiable paper it has long been held that the depositing of a letter in the post-office by the holder to the indorsers is not only good *prima facie* evidence, but sufficient to establish the fact that notice was given; but this rule has been established by the law merchant through commercial necessity.

By the common law this presumption did not exist even as to negotiable paper; and after a careful examination of the authorities we are satisfied that it ought not to be held to arise in ordinary business transactions, and especially between men whose business does not require them to watch the arrival of the mails: *Freeman* v. *Morey*, 4 Me. 50; *Nat. Bank* v. *McManigle*, 69 Penn. St. 156; *Greenfield Bank* v. *Crafts*, *&c.*, 4 Allen 447.

The mailing of the letter in this instance created no *legal* presumption, but was proper testimony to be considered by the jury, together with the other evidence, in determining when it was received; and they should not have been instructed that a presumption arose from it, which must prevail unless overthrown by other satisfactory evidence.

The instructions in other respects were unobjectionable.

The appellants relied upon an alleged new contract between them and the appellee, by which the one sued upon was annulled; but this was a question of fact as to which the testimony was conflicting, and the finding of the jury would not therefore be disturbed, if this were the only question presented by this appeal.

In view of another trial of the case it is proper that we should pass upon what seems to us to be a new question as to the competency of certain testimony; at least we have been unable to find any direct authority upon it.

The appellee upon going to the place, on February 9th 1880, where the property was to be received did not find the appellants or any one representing them there.

He thereupon went to a telephone office at Morgantown, Kentucky, for the purpose of communicating with the appellants at Bowling Green, Kentucky; and not being accustomed to the use of the instrument he got the operator to talk for him. He first directed him to call for the appellant, Sullivan, and he did so, the Bowling Green operator reporting back that he would send for him

to come to the office. Presently the Morgantown operator told the appellee that Sullivan was at the Bowling Green office and desired to know what was wanted; and thereupon a conversation took place, Sullivan using the instrument himself while the Morgantown operator talked for the appellee, and told him what Sullivan said as it came over the wire.

The latter testifies that on that day he had a conversation over the telephone with some one at Morgantown, and upon the same subject to which the appellee says the conversation related; but they differ widely as to what was said. The Morgantown operator, being introduced as a witness, testifies that upon the day named he had a conversation upon that subject with some one at Bowling Green, whom the operator there told him was Sullivan, but that he does not recollect what was said. Under this state of case the court below permitted the appellee to prove by himself and two other persons, who were present at the time, what the Morgantown operator reported to appellee, while the conversation was going on over the wire, as being said by Sullivan.

It is certain that the latter did talk over the wire, because he says so. The appellee did not pay the telephone charge; and it does not appear who did, save the Bowling Green operator reported to the Morgantown one that Sullivan would do so; and the latter is silent upon this point.

It would beyond question have been competent to prove by the Morgantown operator what Sullivan said to him; but whether his report to the appellee of what Sullivan was saying, made as the conversation progressed, is competent or falls within the domain of incompetent hearsay testimony, is a question of importance in view of the astonishing growth of the business to which it relates, and one not free from difficulty.

In the case of a telegram the original must usually be produced in evidence, or its loss shown, before its contents can be proven or the copy delivered by the operator to the party receiving the message used, unless it be where the copy becomes primary testimony by the telegraph company being the agent of the sender.

In the use of the telephone, however, the parties talk with each other as if face to face; and, save where a message is sent, there is no written evidence of what has passed. By inventive means they are brought together for the transaction of business.

It is a well settled rule that where one through an interpreter

makes statements to another, the interpreter's statement made at the time of what was so said is competent evidence against the party.

The interpreter need not be called to prove it; but the interpreter's statement made at the time may be proven by third persons who were present and heard it: *Camerlin* v. *Palmer Co.*, 10 Allen 539; *Schearer* v. *Harber*, 36 Ind. 536; 1 Greenl. Ev., sect. 183; 1 Phillips's Ev. *519.

The reason of this rule is, that the interpreter is the agent of both parties, and acting at the time within the scope of his authority; and we have been unable to draw any satisfactory distinction between this case and the one under consideration.

The argument is at least plausible, if not correct, that the testimony in question is competent as a part of the *res gestæ*, aside from the question of agency.

It is true the parties cannot see each other; but the statements of an interpreter between blind persons could be proven by third parties, without calling the interpreter as a witness; and by telephonic means persons are as much together for all purposes of conversation and actors in what may be occurring as if they were immediately present with each other.

We must not be understood, however, as holding the testimony competent upon the above ground, because there is another reason for so ruling which is conclusive to our minds.

Subject to various qualifications the old rule that a party must produce the best evidence within his power to prove a fact should govern. But as business expands by the aid of new inventions wider scope must be given to the rules of evidence. There is no need, however, of any departure or innovation in this case, because it is a well-settled rule of evidence that the statements of an agent, when acting within the scope of his agency, are competent against his principal.

When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and in such a case certainly the statements of the operator are competent, being the declarations of the agent made during the progress of the transaction.

If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third

party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence.

Judgment reversed.

Judge PRYOR delivered the following dissenting opinion.—The question decided in this case is novel and of great importance to the commercial world.

The terms of a contract are attempted to be established by messages alleged to have been forwarded by one to the other of the parties over a line of telephone extending from Morgantown to Bowling Green.

The appellee being desirous of showing that the appellant agreed to receive a lot of hoop-poles on the bank of Green river within a a certain time, applied to the telephone agent at Morgantown to ascertain from Sullivan, the appellant, at Bowling Green, why he did not attend for the purpose of receiving the poles. The agent at Morganstown telephoned to the agent at Bowling Green in regard to Sullivan, who sent a message back that Sullivan was present at Bowling Green and would answer for himself.

The message sent by Sullivan was (as Sullivan swears, and that fact is nowhere contradicted), to the effect that he had not been notified that the hoop-poles were ready, and therefore did not send to receive them. The appellee says that the message he received from Sullivan at Bowling Green was, that the agent of appellant was sick and for that reason did not send him down. This is denied by Sullivan, and the operator at Morgantown recollects that the message was in regard to the hoop-poles, but fails to recollect what it was. The appellee was then allowed to prove what the agent at Morgantown told him as to the character of the message, and that was "that he failed to send because Allen was sick." He was also allowed to prove, by one or two others in the room, that the telegraph operator at Morgantown made that statement to the appellee. It is not pretended that either the appellee or those present

heard what was said by the appellant, and all they know as to the nature of the response made to appellee's inquiry is what was told them by the operator, who does not himself recollect what the response was. It is difficult to understand upon what principle this testimony is to be admitted. It cannot be said that the operator at Morgantown was the agent of Sullivan, the appellant, at Bowling Green, and for that reason his admissions are binding on the principal. Nor can it be said that he was the agent of Sullivan for the purpose of ascertaining what the contract was, but on the contrary he was the agent of the appellee. The latter wanted this agent to inquire of Sullivan, who doubtless did not even know him, why he had failed to take the hoop-poles on a named day, and the information was given him by Sullivan, as the latter admits. But this admission appellee says is untrue, because the agent of the appellee told other parties, not in the presence of Sullivan, that the reason you failed to come was that your man was sick. The agent don't recollect what the message was, but those present recollect what the agent said it was.

A telephone agent who makes an inquiry through the telephone for the benefit of and at the instance of another, is not made the agent of the party responding. The relation of principal and agent cannot arise farther than to admit the testimony of the operator as to what the conversation was. He will not be allowed to close his mouth, and others permitted to testify as to his statements of what passed between him and the party sought to be made liable.

The human voice, by means of this remarkable discovery, may be heard at almost any distance. It requires neither science or skill to use it as a means of conversation, and the result is that almost any one in the office may be called on to use it for others, and to establish the rule that the declarations of the one receiving the message as to the substance of the response made are evidence is subversive not only of a well recognised rule of evidence, but dangerous in its application.

The operator is not an interpreter in a legal sense. When persons of different nationalities are unable to understand each other they call on an interpreter, and he speaks for them—in their presence—those present hear his statements. This is original testimony, as much so as if the same witnesses were present and heard the parties themselves conversing with each other. There is no analogy between the case of an interpreter and that of a telephone

operator. Here the parties conversing are miles apart; the one is called to respond to the other; when Sullivan responds he is responding to Kuykendall, although through the agency of another. That operator can swear to what the statements were, but his declarations are no more competent than if Kuykendall himself had talked to Sullivan, and reported to others what Sullivan said. If the operator's statements are competent, so would Kuykendall's have been if he had made the inquiry and heard the response.

That one may constitute another, his agent, by telephone is not questioned, but that one who responds to an inquiry makes the party to whom he responds such an agent as that the latter's declarations are competent against him, I deny.

To illustrate the position assumed in this case, and leaving the telephone for a brief moment: the appellee sends the operator at Morgantown to Bowling Green to know of Sullivan why he failed to take the timbers. He makes the inquiry of Sullivan, and reports to those present in the room at the time that Sullivan told him it was because "Allen was sick." This Sullivan denies. Is it then competent for Kuykendall to prove by those present (the operator not recollecting) what report the operator made to them? If Sullivan heard what the operator said to the bystanders it would be competent, or if it could be inferred that he heard what was said it might be competent, but when you concede that he did not hear, as must have been the case when he was telephoned, it would be clearly incompetent. The operator would be as much the agent of Sullivan in the one case as in the other, but really not the agent in either instance.

Two merchants on one side of Main street propose to buy 100 barrels of pork from a merchant on the opposite side. The one directs his clerk to telephone the merchant on the opposite side of the street that he will give him ten dollars per barrel for the 100 barrels. The clerk telephones and reports the response to his principal and those present that the proposition is accepted. The other merchant, who has no telephone, directs his clerk to step to the door and call the merchant on the opposite side, making the same proposition. He does so and reports an acceptance of the proposition. The merchant refuses to deliver the pork in either instance, because he says he agreed to take twelve dollars per barrel, and this was his response, and he proves this to have been the response made by himself and those present. The two clerks fail to recollect what the response was, but it is offered in each instance to prove the report

made by the two clerks to their principal, and in this manner contradict the statements of those who heard the response made. Can such testimony be competent? It is certainly incompetent in the one case and not competent in the other, unless the necessities of trade connected with this new discovery requires a departure from a well recognised rule of evidence.

It is at last a question solely as to what the conversation was. Those who heard it are competent witnesses, but their statements to others as to what they heard are inadmissible.

Suppose Sullivan, instead of talking himself, had conversed through the operator at Bowling Green, then the statements of the operator at Morgantown, according to the principal opinion, could be competent to contradict the oath of the operator at Bowling Green as to the message sent by him. That this could be done if the operator at Morgantown was called as a witness is not doubted, but his statements to others as to the conversation should have been excluded. Nor can such testimony be admitted upon the ground that it was the best testimony the appellee, under the circumstances, could produce. Such a rule would open the door for all hearsay testimony.

Such agents could easily be found willing to report a conversation to others that they would not swear to themselves.

It is maintained, however, that this operator was an agent, and acting within the scope of his authority, and therefore his statements are admissible. What was the scope of his authority? Are the statements of an agent for a special purpose admissible to prove the extent of his authority? If so it is a novel doctrine. The acts of an agent may be permitted so as to presume general authority, but where the power is special and he departs from it, his transaction is void. So if A. authorizes B. to tell C. that he will take his poles on a fixed day, and B. tells him that A. will take them ten days prior to that time, there being no other agency, he has no power to bind A., and certainly his statements are not competent to show the extent of the special agency.

The testimony is purely hearsay, and all the reasons induced by consideration of both public and private interests for excluding that character of testimony apply with great force to this case. While I concur in the reversal of the judgment, I must dissent from so much of the opinion as authorizes the admission of this testimony.

It is well settled that a *prima facie presumption* that a letter was duly received, arises, in the absence of opposing evidence, from proof that it was de-

posited in the post-office properly addressed with the postage prepaid. This presumption is based on the probability that the officers of the government will do their duty, and that letters will be duly delivered: 1 Greenl. Ev., § 40, and cases cited; *Huntley* v. *Whittier*, 105 Mass. 391; *Briggs* v. *Herrey*, 130 Id. 187. This presumption is not a conclusive presumption: *Freeman* v. *Morey*, 45 Me. 50; *Greenfield Bank* v. *Crafts*, 4 Allen 451, 457; *First Nat. Bank* v. *McManigle*, 69 Penn. St. 159. In delivering the opinion of the court in *Huntley* v. *Whittier*, *supra*, GRAY, J., said: "The depositing of a letter in the post-office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of the mails; and where there is no other evidence, the jury should be so instructed:" PARSONS, C. J., in *Munn* v. *Baldwin*, 6 Mass. 316, 317. PARKER, C. J., *Dana* v. *Kemble*, 19 Pick. 112, 114. GIBSON, C. J., in *Callan* v. *Gaylord*, 3 Watts 321; *Oaks* v. *Weller*, 16 Vt. 63; *Russell* v. *Buckley*, 4 R. I. 525; 1 Greenl. Ev., § 40; 1 Tayl. Ev. (5th ed.) § 147. The presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty, and the usual course of business; and when it is opposed by evidence that the letter was never received, must be weighed with all the other circumstances of the case by the jury in determining the question whether the letter was actually received or not; and the burden of proving its receipt remains throughout upon the party who asserts it: *Crane* v. *Pratt*, 12 Gray 348; *Greenfield Bank* v. *Crafts*, 4 Allen 447.

A similar rule prevails as to telegraphic despatches: *United States* v. *Babcock*, 3 Dill. C. C. 571; *Com.* v. *Jeffries*, 7 Allen 563.

The decision of the first point of the principal case, appears, then, to be, beyond controversy, correct.

The second point involved in that case is one of more difficulty, concerning which we have found no decisive adjudicated cases. We have read the opinion of the majority of the court, and the dissenting opinion of Judge PRYOR, with great interest, as well as the cases referred to by the majority of the court in support of their conclusions; and from the best consideration we have been able to bestow upon the case, we are unable to coincide with the opinion of the majority of the court. The case does not seem to us to be analogous to that of an interpreter. In the case of an interpreter, the ground of the admissibility, as against both parties, of evidence of what he said is that he was the agent of *both* parties. If one were to instruct another to make a simple communication in a foreign language to a third party, to which no answer was given, no one would contend that such an interpreter was the agent of the party to whom the communication was made. In the case of an ordinary interpreter, the interpreter is authorized mutually to make communications and to receive and interpret answers thereto. The views above stated are sustained both by principle and authority. Mr. Greenleaf says: "The admissions of a third party are also receivable in evidence against the party who has *expressly* referred another to him for information in regard to an uncertain or disputed matter. In such cases the party is bound by the declarations of the persons referred to, in the same manner and to the same extent as if they were made by himself." 1 Greenl. Ev., § 182.

"This principle extends to the case of an *interpreter*, whose statements of what the party says are treated as identical with those of the party himself, and, therefore, may be proved by any person who heard them, without calling the interpreter:" 1 Gr. Eq., § 883. See, also, the cases of *Fabrigas* v. *Mostyn*, 20 How. St. Pr. 122, 123; *Camerlin* v. *Palmer Co.*, 10 Allen 539.

That the ground of the admissibility of such evidence is that of agency, is rendered more apparent from the fact that the rule does not apply to the case of an interpreter of a witness in a court of justice. Such an interpreter is not an agent of the party calling him, but rather an officer of the court; and evidence of what the interpreter testified on a former trial as having been received by him in a foreign language from a witness on such trial, cannot be given in evidence unless the interpreter be dead, insane, out of the jurisdiction, or sick and unable to testify, or having been subpœnaed, appears to have been kept away by the adverse party: *Schearer* v. *Harber*, 36 Ind. 536.

The ground, then, of the admissibility of evidence of what was said by an interpreter, being agency, how could the appellant be understood to confer authority upon the operator at Morgantown to repeat his communication, when, so far as we can discover from the case, it does not appear that he even knew that he was conversing with appellee through a third person?

Passing the point as to interpreters, the majority of the court appear to have put their decision upon the simple ground of agency. As we have just stated, we are unable to understand how one can be held to confer authority upon an agent of whose existence he is not, so far as we can learn from the case, shown to have been aware. So far as we know, the general custom is for parties using a telephone, to use it in person; or, as stated by the court in the principal case, "the parties talk with each other as if face to face;" and the statement that if the appellee was ignorant whether he was talking to the person with whom he wished to communicate or with the operator, or even any third party, he did it with the expectation and intention, on his part, that in case he was not talking with the one for whom the information was intended, it would be communicated to that person, is a pure assumption of a fact vital to the determination of the case. Where one sends an agent with a verbal message to another, expecting an answer, does the party answering make the agent of the sender his agent also, so that evidence of what the agent reported to his principal can be given by any third person who happened to hear it? If such is the case, it behooves business men to be careful not to make other than written answers to such communications. The case in question seems to be exactly such a case, and to hold otherwise seems to us a perversion of the established rules of evidence. The dissenting opinion of Judge PRYOR, to our mind, places the case in its proper light and lays down the proper rule of law, that "a telephone agent who makes an inquiry through the telephone for the benefit of and at the instance of another, is not made the agent of the party responding;" while the decision of the case by the majority of the court seems to us supported neither by principle nor authority.

M. D. EWELL.

Chicago.

Supreme Court of Connecticut.

JERRY DARRIGAN *v.* THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

A train dispatcher is not a fellow servant with the employees in charge of a train, within the rule relieving the master from liability for injuries caused to a servant by the negligence of a fellow servant.

It is the duty of a railroad company to devise some suitable and safe method of running special and irregular trains, so as to avoid collision, and where the method